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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1924 OF 2007

Gaurishankar Ramdular Singh. ...Appellant.

Vs.

The Municipal Corpn. of Greater Mumbai & Anr. ...Respondents.

Mr. Navin Parekh i/by Mr. Prem S. Gidwani for the appellant.

Mr. J.J.Xavier, for the BMC.

CORAM : ANOOP V. MOHTA,J.

DATED : 1st August, 2007

P.C.

1. The suit premises is shop No.1 admeasuring 76.0871 sq.mtrs. of thereabout situated at Plot No.72, Atma Bhavan, Khar (West), Mumbai 400 052. The said shop came to the Appellant/Original Plaintiff's share by virtue of family partition executed by and between the Appellant/Original Plaintiff, Respondent/ Defendant No.2 and their other two brothers.

2. On 15th January, 1999, Respondent/ Original Defendant No.1 issued a notice under Section 351 of

the Mumbai Municipal Corporation Act (for short, "MMC Act"), on account of the complaint made by Respondent/ Original Defendant No.2 alleging unauthorized construction work in compulsory open space on the ground floor with the help of brick masonry work, ladi, coba etc. as more particularly set out in the said notice.

3. On 19th January, 1999, the Appellant/ Original Plaintiff by his Advocate’s letter replied the said notice under Section 351 of MMC Act denying the allegation of the unauthorized construction.

4. On 9th March, 1999, the Ward Officer, H West Ward, of Respondent/ Original Defendant No.1 Corporation passed an order of demolishing.

5. In March, 1999, the Appellant/ Original Plaintiff filed the present suit challenging the impugned notice dated 15/01/1999 and the impugned order dated 09/03/1999.

6. On 07/04/2007, the Trial Court dismissed the suit. Hence the present First Appeal.

7. Following are the issues involved in the present appeal:-

1. Whether Appellant/ Original Plaintiff proves that the suit premises is authorized?

1. Unproved.

2. Whether Respondent/ Original Defendant No.2 proves that Appellant/ Original Plaintiff carried out illegal construction in question?

2. Proved.

3. Whether notice under Section 351 of the MMC Act dated 15/01/1999 and order passed by Ward Officer dated 09/03/1999 are legal and valid?

3. Legal and valid.

4. What relief?

4. As per final order.

8. **Issue Nos. 1 to 3:-** Appellant/ Original Plaintiff and Respondent/ Original Defendant No.2 led evidence. Respondent/ Original Defendant No.2 has examined six witnesses, D.W. 1 to D.W. 6. Appellant/ Original Plaintiff has examined himself. Respondent/ Original Defendant No.1 after considering the material on the record, issued notice under Section 351 of MMC Act and the Ward Officer after hearing the parties by order dated 09/03/1999 directed to demolish the unauthorized construction in question. Respondent/ Original Defendant No.1 and 2 resisted the complaint and averments made therein of the Appellant/ Original Plaintiff. Except plaintiff's own evidence, there is no material on record to support that the suit premises is authorized and the action of Respondent/ Original Defendant No.1 was illegal. The basic presumption is always in favour of the action or notice issued by the Respondent Corporation under the MMC Act. The burden lies on plaintiff to prove the contrary and or to rebut the presumption. In the present case, Respondent/ Original Defendant No.2 apart from his evidence, has examined 5 witnesses who

are the tenants of the premises surrounding to the suit premises. They are fully aware of the earlier existed open place and the unauthorized construction made by the Appellant/ Original Plaintiff.

9. After going through the evidence of all these witnesses of Respondents/ Original Defendants, I am of the view that the learned Judge right in dismissing the suit by holding that notice under Section 351 of MMC Act as well as the order passed by the Official are legal and valid.

10. The learned trial Judge further right in observing that Defendant No.2 proved that plaintiff has carried out the illegal construction in compulsory open space. In the circumstances and in view of the material placed on record by the Respondents / Original Defendants and the reasoning given by the trial Court, I am also of the view that Appellant/ Original Plaintiff failed to prove that the suit premises is authorized.

11. The learned trial Judge right in observing para 23 and 24 while dismissing the suit filed by the plaintiff. Para 23 and 24 read thus:-

23. So DW 3 to 6 had every opportunity to notice the unauthorized construction and during cross-exam. their cogent and convincing evidence on the point of unauthorized construction in compulsory open space is not shattered. The entire area of CTS No.811 where this bldg. is situated 500 yds. As per the property card Ex. 28 Ex. 45 the bldg. Completion certificate shows that the compulsory open space in compound wall and therefore by this document which is an authentic document to prove the exact location of the premises proved beyond reasonable doubt that there was compulsory open space between the compound wall and Atma Bhuvan Bldg. and from the photographs itself it is seen that space was covered by the plff. by making construction. As in evidence of all witnesses, it is brought on record that it was constructed by the plff. in the year 1998 and plff. failed to prove that he has obtained any permission from the Corpn. for this construction, he failed to prove that the suit premises is authorised or tolerable and the notice U/s. 351 of MMC Act and order passed is illegal and bad-in-law.

24. However, by examining DW 2 and DW 3 to 6 and also producing the bldg. completion plan and the other documents deft. no.2 prove that the plff. had carried out the illegal construction in compulsory open space. Nothing is brought on record to show that this court has no jurisdiction to try this suit. This Court is dealing the cases against MMC under MMC Act and accordingly I recorded my findings to issue Nos. 2 to 5.

12. It is difficult to accept all the contentions raised by the learned counsel appearing for the Appellant/ Original Plaintiff that the trial Court’s Judgment and decree is contrary to the facts, documents and oral evidence. The evidence of the

witnesses just cannot be discarded, merely because the other affidavits of examination-in-chief are identical. Based upon the issues framed, parties need to prove their case on the contrary unless shaken or disturbed the consistent evidence of DW 1 to DW 6, rightly appreciated by the trial Court. The further contention that Respondent/ Original Defendant No.1, Corporation, failed to produce any evidence to justify issuance of notice under Section 351 of the MMC Act and passing of impugned order dated 09/03/1999 has no substance. After issuance of notice under Section 351 of MMC Act and after hearing both the parties, the impugned order dated 09/03/1999 was passed. That order remained intact as noted, the presumption noted in favour of the the action of officials under MMC Act unless rebutted by contra material on record. In the present case as observed, Appellant / Original Plaintiff failed to discharge his burden. On the contrary, Respondents/ Original Defendants proved their case in support of notice and demolition action.

13. Lastly, there is no material to support the case that the action of Respondent/ Original Defendant No.1 was malafide, merely because it was on the complaint of Respondent/ Original Defendant No.2; that itself

cannot be the reason to discard the action initiated by the Respondent Corporation based on the supporting material on record. In the present case, Respondent / Original Defendant No.2 has, further supported the action by examining six witnesses and proved that the construction was unauthorized and illegal.

14. Taking all this into account, there is no substance in this First Appeal.

15. The First Appeal is dismissed.

16. No costs.

(ANOOP V. MOHTA, J.)